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DEVELOPMENTS IN THE CRIMINAL LAW OF MISSOURI

BY J. HUGO GRIMM

The past quarter of a century has witnessed such frequent and severe criticism of the administration of the criminal law in the United States, not only in the lay press, but in legal journals and the addresses of distinguished lawyers and even judges (part of the criticism being directed against the law of procedure as it exists today, and part against the attitude of the courts), that it has occurred to the writer that it might be well to make a fairly complete and careful study of the course of legislation and judicial decision relating to criminal procedure in order to learn whether real progress has not been made in the development of this aspect of the criminal law. As the field is very large we will confine ourselves to the State of Missouri, a choice we deem particularly appropriate in view of the careful crime survey made by the Missouri Society for Criminal Justice in 1925, the report of which was published a year later.

To form any fair idea of what has been accomplished the study must cover a considerable period of time, and this will necessitate an avoidance of some detail.

As a proper background a view, in broad outline, of the criminal law as it existed in England and the American Colonies just prior to our Declaration of Independence will be interesting and desirable for various reasons. It was just at this time that Blackstone's Commentaries were published, the first volume in 1765, the last in 1769. As is well-known this work had a tremendous influence in this country, where, according to a statement contained in one of Burke's speeches, more copies were sold than in England itself. In his fourth book Blackstone gives a clear exposition of the criminal law as it obtained in England in his day, and indeed gives an account of its development from early times.

Blackstone states that practically all felonies were punishable by death and deplores the fact that 160 different offenses were so punishable, and this without benefit of clergy.¹ In speaking of

¹ 4 BL. COMM. *18.

the need of a revision and amendment of the criminal law, Blackstone after suggesting a reference of proposed legislation to a committee of experts continues, "Had such a reference taken place, it is impossible that in the eighteenth century it could ever have been made a capital crime to break down (however maliciously) the mound of a fish pond, whereby any fish shall escape; or to cut down a cherry tree in an orchard, * * * or to be seen for one month in the company of persons who call themselves, or are called Egyptians (Gypsies). It is true that these outrageous penalties, being seldom or never inflicted, are hardly known to be law by the public; but that rather aggravates the mischief, by laying a snare for the unwary."² The accused could not testify in his own behalf. Indeed as Blackstone points out, anciently no witnesses could be sworn in his behalf, although this was changed long before his time.³ The accused was not entitled to be represented by counsel except to present some point of law, but the judges, be it said to their credit, were quite liberal in allowing such assistance.⁴

On the other hand, prosecution for felonies had to be by indictment; an accused could peremptorily challenge twenty jurors (at an earlier date thirty-five) while the Crown was not allowed any;⁵ and the accused, if he could read and write, was given the benefit of clergy in all felonies, unless this right was expressly excluded by the statute.⁶

No doubt because of the severity of the punishment in felony cases and other serious disadvantages under which the accused labored (the result of harsh and unjust rules of law) the courts, moved by humane considerations, went to great lengths in deciding that failure to observe technical requirements relating to mere matters of form in indictments and slight variances between the allegations contained in these instruments and the evidence warranted a discharge of the accused. This was carried to such an extreme that Sir Mathew Hale, whom Blackstone referred to as a most humane judge, sounded a solemn warning in the following vigorous language:

² *Ibid.* *4.

³ *Ibid.* *359.

⁴ *Ibid.* *355.

⁵ *Ibid.* *354.

⁶ *Ibid.* *367.

That in favor of life great strictnesses have been in all times required in points of indictments, and the truth is that it has grown to be a blemish and inconvenience in the law and administration thereof. More offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and in many times gross murders, burglaries, robberies and other heinous and crying offenses escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villainy and to the dishonor of God. And it were fit that by some law this overgrown nicety were reformed which has now become a disease in the law and will, I fear, in time grow mortal without some timely remedy.⁷

That was the state of the law when the Federal Constitution was adopted in 1789. The statesmen who framed that notable instrument and the first eleven amendments thereto seemed impressed with the necessity of protecting the citizen in his rights, especially protecting him against tyranny or oppression. And so we find that the Constitution strictly defines treason, which at common law was a rather expansive term including many different acts. It provides that no bill of attainder and no ex post facto law be passed; that all prosecutions for felony be by indictment, no doubt having in mind the proceedings of the odious Court of Star Chamber which had been abolished. The accused must be informed of the nature and cause of the accusation; he shall have a speedy public trial; he must be confronted with the witnesses against him; he need not give evidence against himself in a criminal case; he is entitled to the assistance of counsel for his defense; moreover excessive bail must not be required nor cruel or unusual punishment inflicted; and the accused must not be put in jeopardy more than once for any offense.

⁷ 2 Hale, PLEAS OF THE CROWN 193. The great chief Justice (Hale) had in other parts of the volume, and preceding the above quotation, pointed out that the misspelling of the latin word *murdravit* by inserting an "e" between the letters "a" and "r" had resulted in discharge of the accused; that it was enough to vitiate an indictment if it failed to allege in which hand the assailant held the weapon, or on which side of the body the wound was inflicted, although if the indictment charged the assault and wounding to have been done with a sword (*cumquodam gladio*) a conviction could be sustained by proof that the killing was by some other weapon. The law was neither consistent nor just, and in many respects was so harsh and severe that one can hardly be surprised that judges resorted to technicalities which were often quite senseless in order to alleviate its injustice.

When Missouri became a state just one-third of a century later it incorporated in its first constitution the substance of the provisions in the Federal Constitution just referred to, and added one other, namely, that the indictment must conclude with the words "against the peace and dignity of the State."⁸

Missouri had been a part of Louisiana Territory. Edward Livingston, a lawyer of distinction and ability, had proposed for Louisiana a code of civil procedure which was adopted in 1805; and in 1820 under an act of the Legislature of that State he also prepared a code of criminal procedure, which, although it was not enacted into law, nevertheless exerted a great influence throughout the country. And it was during this same period that Jeremy Bentham was carrying on his agitation for reform of the law, not only in England but in America as well.⁹

These efforts for reform had an influence which seems to have reached the leaders of the Missouri Legislature, for we find that in the session of 1825 benefit of clergy was abolished (anticipating similar legislation in England by two years).¹⁰ That Legislature also abolished the ancient appeals for felony; it enacted laws providing that in cases of treason and felony it should not be necessary to ask the accused how he would be tried; if he stood mute a plea of not guilty should be entered for him.¹¹ This Legislature further provided that one accused of a capital offense should be furnished with a copy of the indictment and a list of the jury two full days before the day of the trial; also that where

⁸ Mo. Const. (1820) art. 5, sec. 19.

⁹ See Bentham's letter to President Madison, 1811; also his letter to the Governor of Pennsylvania, 1814; his letter to the Governors of the Several States, 1817; and his address to citizens of the U. S., July, 1817. See also his paper relative to codification. 4 Bentham's Works (Bowring ed. 1843) 451.

¹⁰ The reader will no doubt be interested and perhaps surprised to know that benefit of clergy was recognized not only in Colonial times but for some time after the Revolution, and was allowed in *State v. Sutcliff* in South Carolina as late as 1855. White, *LEGAL ANTIQUITIES* (1911) 239.

¹¹ R. S. Mo. (1825) p. 319, sec. 21. Blackstone, after describing the dreadful penalty at common law for obstinately standing mute when arraigned for felony, states that, to the honor of the English law, it has been enacted by statute, 12 Geo. III c. 20, that standing obstinately mute when arraigned for a felony shall be *taken as a conviction of same*. This has since been changed in England so that a plea of not guilty is entered as here.

defendant was arraigned for a crime punishable by death or imprisonment for life, he should have twenty peremptory challenges and in lesser offences ten, without any for the state.¹²

The Constitution having carefully guarded the rights of the accused, and the Legislature in 1825 having supplemented these constitutional safeguards with other legislative provisions which they believed secured him a fair and impartial trial, these early legislators no doubt felt that it was time to put an end to the discharge of accused persons because of the "over-grown nicety" with respect to formal objections to indictments which evoked the warning of Justice Hale, and so they enacted :

That hereafter no indictment shall be quashed or set aside for want of the words "with force and arms" or any such words; and indictments and proceedings in criminal cases may be amended in matter of form at any time before the jury are sworn for the trial of the case.¹³

A later Legislature (just which is not clear) passed the following law:¹⁴

No indictment shall be deemed invalid, nor shall the trial, judgment or other proceeding thereon be stayed, arrested, or in any manner affected; First, By reason of the omission or misstatement of the defendant's title, occupation, estate or degree, or of the county or town of his residence, where the defendant shall not be misled or prejudiced by such omission or misstatement; or Second, By the omission of the words "with force and arms" or any words of similar import; or Third, By omitting to charge any offence to have been contrary to a statute or statutes, notwithstanding such offence may have been created, or the punishment declared by a statute, or Fourth, By reason of any defect or imperfection in matters of form which shall not tend to the prejudice of the defendant.

In a case arising several years after the passage of this statute, the Supreme Court ordered the defendant discharged because the indictment, which was one for assault, gave the name of the person assaulted as "Silas Mehlville" while the proof show-

¹² R. S. Mo. (1825) p. 320, sec. 23.

¹³ R. S. Mo. (1825) p. 320, sec. 24.

¹⁴ This act first appeared in R. S. Mo. (1845) c. 138, art. 4, sec. 17.

ed that his name was "Melvin."¹⁵ A careful reading of the act just quoted will show that it did not reach this variance. It seems to refer only to defects or errors in form in the indictment itself. The Supreme Court had held an indictment invalid which alleged that defendant did strike and thrust the deceased "in and upon the left side of the belly and also upon the right side of the shoulder, giving the deceased then and there, in and upon the left side of the belly and also upon the right shoulder *one wound*," because, the court said, the allegations were repugnant since they alleged one wound in two places on the body, which were removed from each other.¹⁶ It had also held, after the above act had gone into effect, that an indictment laying an offense on a future impossible date was fatally defective.¹⁷

Having in mind, no doubt, these and other cases decided after this act as well as the many technical rules of the common law, the Missouri Legislature in 1855 adopted the following, among other criminal statutes:

Whenever, on the trial of any indictment for any felony or misdemeanor, there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the Christian name or surname, or both Christian name and surname, or other description whatsoever, or of *any person whomsoever therein named or described*; or in the ownership of any property named or described therein, such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial shall be had shall find that such variance is material to the merits of the case, and prejudicial to the defence of the defendant.

No indictment shall be deemed invalid, nor shall the trial, judgment or other proceedings thereon, be stayed, arrested, or in any manner affected; First, By reason of the omission or misstatement of the defendant's title, occupation, estate or degree, or of the county or town of his residence; or Second, By the omission of the words "with force and arms," or any words of similar import; or Third, By omitting to charge any offence to have been contrary to a statute or statutes, notwithstanding such offence may have been creat-

¹⁵ State v. Curran (1853), 18 Mo. 320.

¹⁶ State v. Jones (1854), 20 Mo. 58.

¹⁷ Morkley v. State (1847), 10 Mo. 291.

ed, or the punishment declared, by a statute; or Fourth, Nor for omitting the words "as appears by the record"; nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence; nor for stating the time imperfectly; nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or on a day that never happened; nor for want of a proper or perfect name; nor for want of a proper venue; nor for want of any venue at all; nor for want of a statement of the value or price of anything or the amount of damages, injury or spoil in any case where the value or price, or the amount of damages or injury or spoil is not of the essence of the offence, nor for the want of an allegation of the time or place of any material fact, when the time and place have once been stated in the indictment; nor that dates and numbers are represented by figures; nor for an omission to allege that the grand jurors were empanelled, sworn or charged; nor for any surplusage or repugnant allegation, when there is sufficient matter alleged *to indicate the crime and person charged*; nor for want of the averment of any matter *not necessary to be proved*; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits.¹⁸

On the margin of each of the above acts as well as of four others following them is to be found the notation, "14 and 15 Vict. c. 100," indicating the source of these statutes, although as already pointed out, the prior Missouri law antedated the English act and is the forerunner of section 27 just quoted.

No one can read these last two sections, having in mind common law rulings and prior decisions of the Missouri Supreme Court, without reaching the conclusion that the aim and purpose of the legislature was to prevent persons accused of crime being discharged because of a failure to observe formal and merely artificial allegations in indictments, or because of a variance between the allegations of the indictments and the evidence, unless of such a nature as to prejudice the *substantial* rights of defendant.

To leave no doubt in the matter the lawmakers specified a large number of allegations that had theretofore been held necessary,

¹⁸ R. S. Mo. (1855) c. 127, p. 1175 *et seq.*

and a number of variances that had been expressly held to be fatal, and provided that none of these should be a ground for acquitting the accused. Lest some case decided upon some such unimportant technicality had been overlooked, they added, "nor for want of the averment of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Clearer or more emphatic language could hardly have been found, nor could a combination of justice and good common sense be better stated. Surely it is unscientific to plead facts which need not be proved. No good could be accomplished and the accused might reasonably believe that the facts alleged against him would have to be proved. Why should any defect which did not have a tendency to prejudice defendant in his substantial rights, entitle him to an acquittal?

In view of the fact that the Law of 1855 was manifestly taken from the 14 and 15 Vict. c. 10, it may be pointed out that this act was quite a comprehensive piece of legislation covering some twenty-four sections, the purpose of which was clearly to simplify procedure in criminal cases and to remove the technical niceties and subtleties complained of by Chief Justice Hale more than two centuries before. As indicating its purpose Parliament introduced the act with the following preamble:

"Whereas, offenders frequently escape by reason of the technical strictness of criminal proceedings, in matters not material to the merits of the case and where such technical strictness may safely be relaxed in many instances so as to secure the punishment of the guilty without depriving the accused of any just means of defence; and whereas, a failure of justice often takes place on the trial of persons charged with felony and misdemeanor by reason of variance between the statement of the indictment on which the trial is had and the proof of names, dates, matters and circumstances therein mentioned not material to the merits of the case, and by misstatements whereof the person on trial cannot have been prejudiced in the defense.

It is not necessary to set out the English act, but we may point out that section 1 corresponds to section 22 of the Missouri Act of 1855, being substantially the same. There is the difference, however, that the English act provides that the indictment may

be amended "by some officer of the court or other person" so as to make it correspond to the evidence. Instead of providing for an amendment of the indictment, the Missouri statute in effect provides that the variances therein mentioned shall not be grounds for acquittal; in other words, they are to be disregarded. It may well be that the Legislature of Missouri did not approve of the idea of an officer of the court or some other person amending an indictment found by a grand jury. In any event they thought it better to provide that the variance be disregarded unless material to the merits of the case and prejudicial to the defense of the defendant.

Section 24 of the English Act corresponds to section 27 of the Law of 1855 but is not as comprehensive. It merely specifies a number of formal defects in indictments which shall not invalidate the same. All of these and quite a number in addition are specified in the Missouri act. The English act omits the general provision with which our statute concludes, "nor for want of any matter not necessary to be proved; nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." The Missouri statute is more sweeping by far than the English act from which parts of it were taken. It will be recalled that in the matter of civil procedure we were in advance of our English brethren, the Code of Civil Procedure having been adopted in New York in 1848 and in Missouri in 1849. The influence of the philosophy of code pleading can be seen in the provision that an indictment need not allege facts *not necessary to be proved*.

The legislation just referred to was epoch-making in England and sufficient to make possible the simple forms of indictment and procedure in effect there. But what was the effect of the more comprehensive Missouri statutes? Within five years after the statute was passed the Supreme Court in *State v. Pember-ton*¹⁹ held an indictment in a murder case bad, because in one count the name of the person killed was not *repeated* in the conclusion, and the other did not conclude with the words "against the peace and dignity of the State." As to the latter there can be no criticism, as the Constitution of Missouri provided that all

¹⁹ (1860), 30 Mo. 376.

indictments must conclude with those words. As to the former the opinion can not be justified. The Court stated that it had always been held necessary to charge a killing to have been done "feloniously" although that was a mere term of art, as much so as the word "murder" the omission of which had no tendency to prejudice the accused. It therefore concluded that since in the common law indictment the name of the accused was repeated in the conclusion it was a fatal error to omit this, an error which the statute of jeofails above, did not remedy. The court took a very narrow view of section 27 giving no effect to the concluding sentence.

In 1890 the Supreme Court in *State v. Meyers* held that unless the indictment in its conclusion stated that the grand jurors upon their oaths charged that the defendant did kill and murder the deceased the indictment was fatally defective, and that the statute of jeofails did not cure the error.²⁰ The court (Sherwood, J.) argued that because at common law the failure to use the word "murder" in the indictment resulted in the charge being treated as merely manslaughter, the omission to state in the conclusion of the indictment that "the grand jurors upon their oaths charge" vitiated the indictment entirely—a palpable *non sequitur*. Moreover the court held that the statute of jeofails did not cure the omission, entirely ignoring the most important sentence in the entire act, "nor for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." This case was followed or cited with approval in many cases and as late as *State v. Ferguson*,²¹ *State v. Sanders*,²² and *State v. Cook*.²³ In the later cases of *State v. Dawson*²⁴ and *State v. Minor*,²⁵ its doctrine was extended to informations.

In *State v. Green*²⁶ an indictment for murder in the first degree was quashed which alleged that defendant "did shoot off and discharge at and upon said Joseph Beaumont" a certain

²⁰ 99 Mo. 107, 12 S. W. 516.

²¹ (1899), 152 Mo. 98, 53 S. W. 427.

²² (1900), 158 Mo. 610, 59 S. W. 993.

²³ (1902), 170 Mo. 211, 70 S. W. 403.

²⁴ (1904), 187 Mo. 60, 85 S. W. 526.

²⁵ (1905), 193 Mo. 598, 92 S. W. 466.

²⁶ (1892), 111 Mo. 585, 20 S. W. 304.

pistol, "thereby and thus striking the said Joseph Beaumont with said leaden bullet inflicting on and in the forehead of said Joseph B. one mortal wound" because the court said the words "thereby and thus striking" indicated that the pleader had previously alleged a "shooting and wounding" when as a matter of fact he had not. In *State v. Fairlamb*²⁷ an indictment for murder was held bad because it did not allege a felonious intent, although the indictment charged that the assault had been feloniously made with a "neapon," namely a gun. This error in spelling, no doubt a typographical error, was criticised by the court. In *State v. Rector*²⁸ defendant was charged with murder in having killed deceased by striking him a hammer—omitting the word "with" and the indictment was held fatally defective. A similar ruling was made in *State v. Fugerson*.²⁹ In *State v. Woodward*,³⁰ where the indictment alleged that defendant feloniously "did strike and beat" the deceased upon the right side of the head with "the club aforesaid and inflicting and giving to said deceased a mortal wound" it was held bad because it did not show the wounding was connected with the felonious assault, since the indictment did not use the stereotyped language "then and there." These cases show that for a full half century after the passage of the important statutes of 1855 the Supreme Court regarded them with disfavor and either placed a very narrow and unreasonable construction upon them or ignored them entirely.

In common fairness to the judges of the Court it must be said that during this period of fifty years there were a number of cases in which the strict technicalities of the common law were brushed aside. Thus in *State v. Dale*,³¹ where the charge was murder, the court held the indictment good, though it omitted the word "premeditatedly," deciding that the word "deliberately" included all that was embraced in the omitted word. And the indictment in *State v. Taylor*³² was held good though it charged that two mortal wounds had been inflicted with one leaden bullet.

²⁷ (1894), 121 Mo. 137, 25 S. W. 895.

²⁸ (1894), 126 Mo. 323, 23 S. W. 1074.

²⁹ (1899), 152 Mo. 92, 53 S. W. 427.

³⁰ (1905), 191 Mo. 617, 90 S. W. 90.

³¹ (1892), 108 Mo. 205, 18 S. W. 976.

³² (1895), 126 Mo. 531, 29 S. W. 598.

In *State v. Jones*,³³ an 1854 case, a similar allegation had been held so inconsistent and repugnant as to vitiate the indictment and this ruling probably caused the Legislature to amend the Act of 1845 to write into that of 1855 the words "nor for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged."

In the past twenty years, and more particularly in the last ten, the Supreme Court has not only manifested a determination to give full force and effect to the statute of jeofails, placing a fair and liberal construction upon a statute intended to be remedial, but has shown considerable impatience with technical and formal objections where it did not appear probable that the rights of the defendant had been prejudiced. A reference to the decisions of the Court in recent years will show that it is constantly relying on the statutes of jeofails to avoid reversing cases on trivial and unimportant technicalities. In 1917 in *State v. Borders*,³⁴ a murder case, the Court held the information good although it did not allege where the deceased died. Article II, section 22 of the Constitution of Missouri was invoked but the Court said: "The charge must contain a certain description of the crime of which the defendant is accused, and a statement of the facts by which it is constituted, so as to identify the accusation lest the grand jury should find a bill for one offense and the defendant be put on his trial for another." The Court then explains that the place of death was not a substantive fact, and its averment unnecessary, stating that this was in accord with reason and the statute of jeofails and that regardless of what may have been the rule at common law or may be the rule elsewhere, the omission of this allegation was not fatal in this state. The Court then proceeds:

In the enactment of our Statute of jeofails, a purpose was evinced to free criminal charges of many of the useless technicalities required at common law. There is a growing disposition on the part of the courts in the wholesome administration of justice, more evident now than heretofore, to discourage reversals unless the error claimed to have been committed deprived the defendant of some substantial right.

³³ 20 Mo. 58.

³⁴ (Mo. 1917), 99 S. W. 180.

Two years later in *State v. Ferguson*³⁵ the court held that the omission of the word "wilfully" in an indictment charging murder did not affect the validity of the indictment, since the words "with malice aforethought" necessarily implied that the act was done wilfully. In *State v. Webb*,³⁶ a murder case where it was claimed that the fact that deceased received a wound in the head instead of in the body as alleged in the indictment was fatal, the court overruled the point, basing its action on the statute. In *State v. Flannery*³⁷ where there was an error in naming the person alleged to have been killed, the name stated being "Connell" instead of "O'Connell," the court said:

Defendant knew the nature of the charge preferred against him, the time and place where it was alleged to have been committed. Possessed of this knowledge, in what respect could he have suffered injury if the complaint had charged him with having struck and killed John Smith instead of Olin McConnell? Courts should not lend themselves to subterfuges as defences where not even an intimation of prejudice is made. The time has passed, not only in this state but elsewhere, when pure technicalities, in the absence of well defined injury to the accused, will be permitted to obstruct the enforcement of the criminal law.

The decision of the Court was clearly correct, for even at common law the doctrine of *idem sonans* would be applied in such case, but the language quoted fairly illustrates the attitude of the court towards technical defences.

In *State v. Hascall*³⁸ the Court, referring to the rule that in indictments for felony nothing must be left to intendment, explains the rule as applied in more recent times as follows:

While it is true in a criminal charge that nothing must be left to intendment or implication, this rule must be construed as having reference to such allegations as are necessary to inform the defendant of the nature and cause of the accusation and not extrinsic matter, the averment of which is unnecessary, and if averred need not be proven.

³⁵ (1919), 278 Mo. 119, 212 S. W. 339.

³⁶ (1914), 254 Mo. 414, 162 S. W. 622.

³⁷ (1915), 263 Mo. 579, 173 S. W. 1053.

³⁸ (1920), 284 Mo. 607, 226 S. W. 18.

Surely, this quotation expresses not only the spirit but the manifest meaning of the Statutes of 1855.

Coming to quite recent times it will be observed that the Court has turned its face more firmly than ever against technical objections which are not based upon some reasonable showing that defendant was prejudiced by the failure to observe some formal procedural requirement. Thus where formerly failure of the record to show that defendant was arraigned was considered ground for reversal,³⁹ today it is not deemed necessary that the record show this.⁴⁰ And now where defendant answers ready for trial there is a waiver of arraignment.⁴¹ In a case where the indictment was endorsed by the foreman of the grand jury, who merely signed his name but omitted the description of "Foreman," this omission did not affect the validity of the indictment.⁴² So also a verdict not signed by the foreman was held good.⁴³ And a failure to state the defendant's name in a verdict was held not to invalidate it.⁴⁴

In *State v. Bowman*⁴⁵ on a trial for a felony, defendant was represented by two attorneys. When the time for a recess came the court inquired whether the parties agreed that the jury might separate. In reply one of defendant's attorneys stated that he himself was willing, but upon conferring with his associate the latter was not willing to have the jury separate. The court nevertheless permitted a separation, and the appellate court refused to reverse, no showing of prejudice to defendant having been made. Considering the practice at common law in connection with the statute, this seems an extreme case. Yet it is quite improbable that any person should undertake improperly to influence a jury to find a verdict of guilt. The court was justified in holding that in the absence of any showing of an attempt to influence the jury the error, if any, was not prejudicial. More-

³⁹ *State v. Williams* (1893), 117 Mo. 379, 22 S. W. 1104.

⁴⁰ *State v. Ferris* (Mo. 1929), 16 S. W. (2d) 96.

⁴¹ *State v. Borchert* (1926), 312 Mo. 447, 279 S. W. 72; *State v. Robnett* (1926) 312 Mo. 635, 281 S. W. 29.

⁴² *State v. Douglas* (1925), 312 Mo. 373, 278 S. W. 1016.

⁴³ *State v. Lewis* (Mo. 1926), 278 S. W. 706.

⁴⁴ *State v. Stewart* (1926), 316 Mo. 150, 289 S. W. 822; *State v. Gibson* (Mo. 1927) 300 S. W. 1106.

⁴⁵ (Mo. 1928), 12 S. W. (2d) 51.

over counsel's somewhat equivocal statement may have been taken as a consent.

A case illustrating the lengths to which the court will now go to sustain a conviction in spite of irregularity in procedure, where no prejudice appears to have resulted, is that of *State v. Wood*⁴⁶ where the jury after retiring had the deputy sheriff inquire of the judge whether they could find a verdict of guilty but leave it to the court to assess the punishment, and the court instructed the deputy sheriff to tell the jury that they could. He did so. The safer and better plan would have been for the trial court to have the jury brought before it, have the foreman ask the question, and then to have the court answer it. It was irregular to permit (or instruct) the sheriff to communicate with the jury; and while it was clear that no harm had resulted, one can readily imagine how the judges of fifty years ago would have been shocked at such an informal method of procedure and have felt it their duty to reverse the case as a lesson to trial judges.

For some years there had been a lack of harmony in the decisions of the Supreme Court upon the question of how far the court must go in a felony case in instructing the jury in the absence of requests by defendant. There were some cases which held that the court must instruct "on all questions of law arising in the case," leaving out the important qualifications of the statute "necessary for their information in giving their verdict," and overlooking the fact that this statute merely prescribed the order of trial rather than the scope of the instructions.⁴⁷ The Court has now settled the matter, adopting a practical and at the same time a just view, which is concisely expressed in *State v. English*,⁴⁸ where the Court held that the statute required that the jury be instructed on the points necessary for them to know to render an intelligent verdict and not others—unless there was a request for broader instructions. The Court said: "What is meant by the expression 'collateral to the main issue' is stated in the case of *State v. Lackey*, where quoting from an early case, the opinion says it is the duty of the court 'to require the jury

⁴⁶ (Mo. 1928), 11 S. W. (2d) 1040.

⁴⁷ R. S. Mo. (1919) sec. 4025.

⁴⁸ (1925), 308 Mo. 695, 274 S. W. 470.

to find all of the essential elements of an offence embraced within the charge, anything else is collateral.' ” And the Court now requires of defendant's counsel who desire instructions on collateral matters that they present such instructions to the court instead of merely making an oral request that the court instruct upon this or that proposition. While the decisions just referred to indicate the attitude of the Court upon matters of formal procedure, recent decisions of the Court on the sufficiency of indictments, and the emphatic language employed by every one of the judges composing the division of the Court to which criminal appeals are assigned show the advanced views held by the judges.

The old case of *State v. Meyers*,⁴⁹ which was wrong in principle, was nevertheless followed as a precedent over so long a period of time that the Court hesitated definitely to overrule it. But its doctrine was no doubt distasteful to the judges. The first step in the process of getting away from it was to refuse to apply its doctrine to informations, limiting it strictly to indictments.⁵⁰ This was merely a step in the right direction. Since informations and indictments serve the same purpose, the same rules should apply as to the necessary averments of all matters of substance. The only differences would be those of a formal nature based upon the fact that one is prepared and returned by the prosecuting attorney, the other by the grand jury. The learned judge who wrote the opinion in *State v. Lee* evidently felt a delicacy about overruling a case which had been so often followed. However, the reasoning of his opinion indicates that his views were not in harmony with those expressed in the earlier case.

A few years later the question came before the Court squarely in *Ex parte Keet*.⁵¹ The petitioner had been convicted of murder in the second degree on an indictment which lacked the formal conclusion used in common law precedents, and therefore he sought his discharge on habeas corpus. In its opinion the Court held it was not necessary to follow the formal conclusions of common law indictments and after an exhaustive review of the

⁴⁹ N. 16 above.

⁵⁰ *State v. Lee* (1924), 303 Mo. 246, 259 S. W. 798; *State v. Renneson* (1924), 306 Mo. 473, 267 S. W. 850.

⁵¹ (1926), 315 Mo. 695, 287 S. W. 463.

whole subject expressly overruled *State v. Meyers* and the line of cases following it. Perhaps a brief quotation from this opinion would be interesting as well as illuminating. It reads:

From the foregoing historical resume it appears that years ago in England there was in force a statute which deprived persons guilty of "wilful murder" of the "benefit of clergy," and that in order to bring the case within the statute it was deemed necessary to use the language of the statute itself in describing the offense—a rule of pleading as applicable to purely statutory crimes frequently invoked. At the same time it was necessary in indictments for murder to describe with particularity the weapon used in killing, and to allege its value. This weapon was forfeited to the king, by whom it was supposed to be applied to pious uses.

Under our law there is no more reason why an indictment should rehearse the ancient formula in conclusion than that it should allege the value of the weapon with which the homicide was committed. *It is a mere form without life or substance, which we have been idolatrously following.* If its omissions be regarded as a "defect or imperfection," it is one "which does not tend to the prejudice of the substantial rights of the defendant upon the merits" and which therefore does not render the indictment invalid."

This decision was by the Court en banc and all the judges concurred, except one who was absent.

In the later case of *State v. Glass*,⁵² a case of murder in the second degree based on an information the Court, referring with approval to *Ex parte Keet*, says: "We pointed out in *State v. Lee*⁵³ that this formal sonorous conclusion was a part of the habiliments of the charge and performed the same office for the indictment that judicial robes performed for the judges, investing them with apparent dignity, but adding nothing to the weight or soundness of their judgment." The objection made to the information was that it lacked the formal conclusion, an objection which made very little impression upon the Court.

Another case should be cited in this connection as showing how far the Supreme Court has departed from old common law rules in criminal cases. In *State v. Ferris*⁵⁴ the Court said:

⁵² (1927), 318 Mo. 611, 300 S. W. 691.

⁵³ (1924), 303 Mo. 246, 259 S. W. 798.

⁵⁴ (Mo. 1929), 16 S. W. (2d) 96.

Allegations in the information not necessary to be proved may be rejected. Sec. 3908 R. S. 1919. Defendant suffered no injury therefrom and has no ground for complaint. The rule of the common law that charges of crime should be certain to every intent without any intendment to the contrary is no longer the rule in this jurisdiction especially in regard to statutory offences. Allegation of certainty to a common intent or reasonable certainty are in such cases, all that are required. By this is meant such particularity in allegations that the identity of the offence may be determined from the face of the charge, that the accused may be enabled to know what he has to meet that he may prepare his defense, and authorize a conviction or acquittal to be pleaded in bar to another prosecution for the same offence.

In a very recent case, *State v. Carson*,⁵⁵ it was decided that the state could appeal from an order setting aside a conviction and granting a new trial because of the insufficiency of the indictment, and it was further held that an indictment for selling mortgaged property was not fatally defective because it did not allege that the mortgaged bank was a corporation. As to the latter point the Court overruled a line of cases and in so doing gave an expression of the present tendency of the courts in this language:

It must be remembered that the rulings upon which the defendant relies were made when technical errors, having nothing to do with the guilt or innocence of the accused, were generally held to be sufficient to authorize a reversal. They were in accordance with the habit of mind which the older practitioners had acquired from long familiarity with the tendency to protect one charged with crime in the enjoyment of every right and privilege which could be construed in his favor, regardless of whether it affected his guilt or innocence. The tendency now is to look at the substance of the accusation and not its form. The rules of pleading and procedure are to be construed so as to determine whether the defendant on trial is or is not *in fact* guilty of the crime charged, and not whether through some formal irregularity in the proceeding against him he may dodge the issue of guilt or no guilt. It is necessary only to preserve to him all the rights which enable him to make his defense upon the *facts* affecting his guilt or innocence.

⁵⁵ (Mo. 1929), 18 S. W. (2d) 457.

The foregoing review justifies the conclusion that the Missouri Legislature three-quarters of a century ago took a decidedly advanced position in the matter of liberalizing the law of criminal procedure; that for a long time thereafter the Supreme Court construed these statutes strictly and gave but limited effect to them; that within the past twenty-five years, however, the Court's attitude has completely changed, so that it is now giving the fullest effect to the spirit as well as the letter of the statutes.

Strange to say, in latter years the Legislature has shown an unwillingness to move forward and enact laws necessary to still more simplify criminal procedure and make it more effective in the administration of justice. Having made an exhaustive survey of the administration of criminal justice in this State, the Missouri Society for Criminal Justice caused some fifty bills to be introduced in the legislative session of 1927. As to the necessity or wisdom of some of these there might have been room for differences of opinion, but it is inconceivable that among the number introduced there were not some possessing unquestioned merit. Still not one was enacted into law. Nothing daunted, the Society caused most of these bills to be again introduced in the session of 1929 where they suffered the same fate. Whether the law makers regarded these efforts as an attempt to coerce them to legislate along certain lines, or whether the program was too ambitious and fell from its own weight, the fact remains that it received scant consideration. Probably if but a few of the more important bills had been introduced, some at least would have met with favor and have become laws.

One bill provided for a simple form of indictment, but also provided that the accused might demand a bill of particulars. It would be much more in keeping with the spirit of progress to say in an indictment for murder in the first degree, that the grand jurors of the City of St. Louis upon their oaths charge John Smith with murder in the first degree, in this, that on January 10, 1929, in the City of St. Louis, Mo., he wilfully, deliberately and of his malice aforethought shot A. B. with a pistol and inflicted a wound on his head, from which he died on January 12th, 1929, than to follow the long form now in use containing a number of averments which need not be proven, and endless and useless repetitions.

Yet when this bill was read in the Senate, a distinguished member, who was a lawyer, objected to it because he said it would unsettle the entire criminal procedure in Missouri. No doubt he was sincere, but he evidently had given the matter little or no study or thought. Had he given the matter any study he must have known that as early as 1855 the English statute referred to above provided that an indictment for murder need not set forth the manner in which nor the means by which the death of the deceased was caused, but need only charge that "defendant did feloniously, wilfully and of his malice aforethought kill and murder the deceased." He might also have known that the State Supreme Court had decided that "malice aforethought included the idea of wilfulness so that the omission of either word, "wilfully" or "premeditatively," or both would not vitiate an indictment. Indeed he might have known that so long ago as 1545 the first of these remedial statutes was passed which dispensed with the necessity of alleging in an indictment for murder the kind of instrument with which death was produced.⁵⁶ In England since 1915 an indictment for murder simply states that the grand jury charges defendant with mur-

⁵⁶ Since this Statute, passed in the reign of Henry VIII, shows in its preamble how thoroughly the legislators at that early day appreciated the absurdity of requiring a number of allegations in indictments which need not be established by evidence, we quote the statute in full: "Where before this time it was and yet is commonly used in all indictments and inquisitions of treason, murder, felony, trespass and divers other, to have comprised and put in every the same indictments and inquisitions these words, *Vi et armis*, and in divers of the same indictments to declare the manner of the force and arms; that is to say, *Vi et armis videlicet, baculis, cultellis, arcubus at sagittis*, or other such like words in effect, where of truth the parties so indicted had no manner of such weapons at the time of the said offense, committed and done; yet in default and lack of the same words, the said indictments were, and yet be, taken as void in law, for to put any person to answer thereunto; and the party or parties so indicted, for lack of the same words not being comprised and put in the said indictments have taken advantage thereof, and have avoided the said indictments by writ or writs of error, or by plea upon his or their appearance, as the same case did require; For reformation whereof be it enacted by the King, our sovereign lord, with the assent of the lords, spiritual and temporal, and of the commons, in this present parliament assembled, and by the authority of the same, That, from the feast of the nativity of our Lord God, next coming, these words, *Vi et armis*, viz., *cum baculis, cultellis, arcubus et sagittis*, or such other like, shall not of necessity be put or comprised in any inquisition or indictment." 37 Hen. VIII c. 8.

der. Then follows: "Particulars of offence: A. B. on the — day of — 19 — in the County of — murdered J. S."—Not only this, but there are some half-dozen common law states in our Republic which have long ago adopted a simple form of indictment, and the even course of justice has not been disturbed. Indeed a little reflection will satisfy any reasonable man that it is much fairer to have a criminal indictment charge the essential facts in simple, plain, concise, modern language which the accused can understand than to fill it with technical terms which he does not understand, with useless repetitions, and worse still, with allegations which not only need not be proved but often are absolutely untrue in fact. This is not scientific; it is not even just or fair to the defendant. The act proposed was not only based on correct principles of pleading, but it made the law speak in plain language and it gave to the defendant a valuable right which he does not now enjoy—that of demanding a bill of particulars. At the present time he is charged with shooting a certain person in the City of St. Louis on a certain day. The state may prove that the shooting occurred on an entirely different day and the indictment will still be good. St. Louis is a large city and to say that an act was committed in this City is not very specific. Now with a short indictment and the right to demand a bill of particulars the defendant's substantial rights are much more fully protected. He could demand to know the exact day and at least the approximate time of day, and he could demand to know the particular place where he is supposed to have committed the crime. At present if defendant desires this information he is driven to take the depositions of the witnesses whose names appear on the indictment. Yet the very persons who opposed this and other measures took the lofty position that they were protecting accused persons from over-zealous and impractical reformers who were more intent on filling our penitentiaries than seeing that justice was done.

This review of the legislation in this State and of the course of judicial opinion indicates quite clearly that reform in the criminal procedure of Missouri was initiated by the Legislature, a phenomenon by no means uncommon; that the courts at first and for a considerable time proceeded cautiously in applying

these statutes; but as their wisdom was tested and proved the courts not only regarded them much more favorably and placed a much more liberal construction upon them, but became imbued with the spirit which led to their enactment and wiped out many useless technicalities which are in no wise covered by these statutes.

A comparison of the criminal law in Missouri as we find it today in decisions of the Supreme Court and existing statutes with the law as it existed in Blackstone's time or in 1820 when Missouri was admitted into the Union or in 1845 or as recently as 1905, can give only cause for deep satisfaction. The law has progressed steadily, and if its growth has been slower than one might wish, it is something to know that it has grown steadily in the right direction. If occasionally we find a decision which seems to take a step backward we also find that in due course it is corrected.

It is no doubt true that in other states legislation has advanced faster and further than in Missouri. But legislatures are responsive to the popular will, and when the Missouri Assembly becomes satisfied that the people are earnest in demanding certain legislation it will soon follow.

The importance of a simple, direct and effective procedure in the courts, securing a fairly speedy determination of the guilt or innocence of the accused, will be conceded on all sides, as will be the obligation of the legal profession to aid in freeing the law from unnecessary procedural impediments; but the fact remains that there is something more important requiring serious attention because it is fundamental. The most serious problem is not that of determining the guilt or innocence of one charged with crime, but the question, "What causes people to commit crimes?" And then there is the other, hardly less serious and important question, "What shall we do with the so-called criminal?" How shall we treat him? Hanging or electrocuting men does not seem to deter others from committing murder, and penitentiaries have not been an outstanding success as institutions for reforming offenders. Haven't our methods of treating these unfortunates been wrong?—and how may they be improved? These are questions which call for the best thought and study of ex-

perts in many branches of science—sociology, psychology, medicine, economics, politics, and we might add anthropology. When we know more about the causes of crime and the best methods of treating offenders, it will then be for the law-making branch of the Government to enact laws which will enable the courts to deal with crime more scientifically and effectively.